

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

FREEDOM OF INFORMATION OFFICE
Washington, D.C. 20570

April 13, 2001

Alan Becker
Jackson Lewis Schnitzler & Krupman
1000 Woodbury Road – Suite 402
Woodbury, New York 11797

Dear Mr. Becker:

—This is in response to your telefax dated March 20, 2001 to Yvonne T. Dixon, Director, Office of Appeals, received in this Office for reply on March 28, 2001, in which you request a copy of the appeal filed in **American Institute of Physics**, Case 5-CA-29366.

The document encompassed by your request, which is part of the investigative file in an open case, is privileged from disclosure pursuant to Exemption 7(A) of the Freedom of Information Act (FOIA). 5 U.S.C. § 552(b)(7)(A). Exemption 7(A) of FOIA allows an agency to withhold records included in an open investigatory file where disclosure could reasonably be expected to interfere with enforcement proceedings.

However, in accordance with the General Counsel's longstanding policy of providing copies of appeals to parties in a case, notwithstanding FOIA considerations, a copy of the appeal, without attachments, if any, is enclosed. Deletions in the appeal have been made pursuant to the policies embodied in Exemptions 6, 7(C), (D) of the Freedom of Information Act, since disclosure of those portions could constitute an unwarranted invasion of privacy or reveal confidential sources.

Finally, please be advised that the processing of the appeal will not be postponed pending receipt of your response, if any, to the document.

The undersigned is responsible for the above determinations. You may obtain a review thereof under the provisions of § 102.117(c)(2)(ii) of the Board's Rules by filing an appeal with the General Counsel, National Labor Relations Board, Washington, D.C. 20570, within 20 days (excluding Saturdays, Sundays

and legal holidays) from the receipt of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Sincerely,


John W. Hornbeck
Freedom of Information Officer
Telephone: (202) 273-3840

cc: Director, Region 5
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bc: Appeals
Chron

March 16, 2001

Yvonne T. Dixon, Esquire
Director, Office of Appeals
National Labor Relations Board
Franklin Court Building
1099 14th Street, NW; Room 8820
Washington DC, 20570-0001

Re: American Institute of Physics; Case No. 5-CA-29366

Dear Ms. Dixon:

Charging Party Jeff Schmidt ("Schmidt") respectfully appeals Region 5's dismissal of his unfair labor practice charge alleging that his employer, the American Institute of Physics ("Institute"), discharged Schmidt in violation of Sections 8(a)(1) and 8(a)(3) of the Act. The dismissal should be reversed and a complaint issued because the available evidence shows that the Institute's termination of Schmidt was motivated solely by Schmidt's significant history of concerted activity to improve the working conditions of he and his co-workers at the Institute.

The Institute's asserted reason for firing Schmidt -- that he wrote a book in part on company time -- is a transparent pretext. In conformity with the industry norm, many writers employed by the Institute did outside writing on company time. The Institute took no disciplinary action against those employees; rather, it condoned (or even encouraged) the practice. What distinguished Schmidt, and ultimately led to his discharge, was that for many years he spearheaded concerted employee efforts to improve working conditions at the Institute, and did so in the face of blunt warnings that he must stop such protected activity or "pay the penalty." When Schmidt persisted, management seized upon Schmidt's

“admission” that he wrote his book on company time to rid itself of the budding unionist. Such retaliation is an archetypal violation of the Act.

SUMMARY OF THE CASE

Jeff Schmidt worked as an editor for *Physics Today*, a magazine owned and published by the Institute for 19 years. During that time, he consistently produced commendable work product. Nonetheless, on May 31, 2000, he was summarily fired, supposedly for doing what he and others (at the Institute and throughout the industry) did with management’s tacit blessing – using his spare time at the office to engage in freelance writing.

The real explanation for this otherwise inexplicable conduct lies in Schmidt’s protected activity and management’s displeasure at such activity. Thus, throughout Schmidt’s tenure at *Physics Today*, he participated with, and often organized, his co-workers in concerted activity seeking to improve the working conditions of the magazine’s staff. On many occasions, both orally and in writing, Schmidt presented the concerns felt by he and his colleagues on a variety of matters, including the felt need for relief from an increasing workload, the abusive treatment staff received from some managers, and a request for increased staff participation in grievance procedures.

Management’s response was also consistent. It actively discouraged such activity. Evidence of the Institute’s animus (detailed below) includes verbal outrage at Schmidt for speaking on behalf of his co-workers at staff meetings, performance evaluations criticizing Schmidt’s concerted activity (not his work product), and even an order forbidding Schmidt and his co-workers from having private conversations concerning

workplace concerns. Ultimately, in 1998 (and again in 1999) Schmidt was downgraded on his performance review, explicitly because of his protected activity in voicing his, and his co-workers, concerns. When he appealed to higher management, arguing that this review constituted an improper reprisal for protected activity, he was told by the Director of *Physics Today* that "when you do things your supervisors would be happier that you not do, then you have to be willing to pay the penalty."

In April 2000, Schmidt published his first book, Disciplined Minds: A Critical Look at Salaried Professionals and the Soul-Battering System That Shapes Their Lives.¹ While the vast majority of the writing was done at home, including a six-month unpaid leave of absence, Schmidt also worked on the book during his lunch hour and breaks. At the time, such activity engendered no comment from management. That was not surprising, for it was commonplace for employees (at *Physics today* and throughout the industry) to pursue freelance work at the office. Others at *Physics Today* did so openly and were not reprimanded, even when their freelance work was well-known to management.

Nonetheless, the Institute seized on a single passage of hyperbole in the Introduction to Schmidt's book -- the statement that "This book is stolen. Written in part on stolen time." -- to fire him. That was an obvious pretext. Management was not upset that one of its editors had become a successful author. Rather, management saw Schmidt's literary characterization of his production methods as the perfect excuse to rid itself of an employee who, against management's wishes, continued to organize his fellow workers to

¹ Schmidt, Jeff. Disciplined Minds: A critical look at salaried professionals and the soul-battering system that shapes their lives; Rowman & Littlefield Publishers, Inc., 4720 Boston Way, Lanham, Maryland 20706.

stand up for their rights. For that infraction, the Institute inflicted the ultimate workplace penalty – summary dismissal. In doing so, it violated the most basic provisions of the Act.

STATEMENT OF FACTS

Jeff Schmidt began working as an editor for *Physics Today* in March 1981. [REDACTED]

[REDACTED] During his 19 years at the Institute, Schmidt continuously participated in, and often organized, concerted activity aimed at improving the working conditions of the magazine's support staff, writers, and other editors. These concerted activities were often met with criticism and reprisals from management. Below is a description of some of the activities that Schmidt participated in, and of management's responses thereto.

Schmidt's Concerted Activity and Management's Hostility to Such Activity

(1) In October 1983, Schmidt and five co-workers boycotted the annual *Physics Today* advisory committee luncheon to protest the support staff's exclusion from the committee meeting. Schmidt and co-worker Daniel Gladstone wrote a memorandum, signed by eight staff members, explaining the protest,³ and submitted it to the magazine's

² Because the Regional Director issued a "short form" dismissal (See Exhibit 1), we cannot tell his reasoning for refusing to issue a complaint in what appears to us is a clear violation. It may be that Mr. Schmidt, who was then unrepresented did not fully appreciate the significance of adducing facts concerning his protected, concerted activity and management's animosity to such activity, or that he did not understand the importance of showing what is obvious to any writer or editor, that freelance writing was accepted and encouraged, at *Physics Today* and throughout the industry. Accordingly, we take this opportunity to supplement the record and, if thought necessary by the Office of Appeals, would be happy to cooperate in any further investigation.

³ The body of the Memo stated:

We regret we will not attend today's lunch. Because we are no longer included in the day's substantive discussions, we do not feel it is appropriate for us to attend the day's more social event. We are sorry

advisory committee. See Memo from *Physics Today* Staff to The Advisory Committee and Dr. H. Davis, dated Oct. 11, 1983 (Exhibit 3). The Institute's management called a meeting of the *Physics Today* staff and demanded greater discipline. Later that month, Schmidt and several co-workers drafted and issued a seven-point memo, "General Problems With [*Physics Today*] management," raising concerns around "work flow," "delegation of responsibility," "staff input," and "keeping staff informed." See Memo dated October 27, 1983 (Exhibit 4).

(2) In November 1989, Schmidt assisted Per H. Anderson, a co-worker who had recently been fired, in preparing his appeal to the Director of the Institute. The appeal detailed Andersen's mistreatment by management, including an "unacceptable workload and salary." See Letter (Draft) to Dr. K. Ford from Per H. Anderson, dated November 21, 1989 (Exhibit 5).

(3) In January 1991, Schmidt played a leading role in organizing seven staff members to meet off-site and discuss working conditions at *Physics Today*. Following that meeting, the group drafted a memo addressing their concerns and the need for improving the magazine's "perennial scheduling problem," "low morale at *Physics Today*," and management's "disrespectful and frequent abusive treatment of staff members." See Untitled Memo (Exhibit 6). Because one or two members of the group were fearful of reprisal, the memo was never submitted to management. At subsequent staff meetings, however, Schmidt raised these issues with management.

to inform you so late, but we had been waiting for a more definite invitation to be made.

Memo from Physics Today Staff to The Advisory Committee and Dr. H. Davis, dated Oct. 11, 1983 (Exhibit 3).

(4) In June 1994, Schmidt organized a meeting of ten staff members to specifically address the disrespectful, sometimes abusive treatment they received from the Editor of the magazine, Gloria Lubkin. When Managing Editor Kenneth McNaughton discovered the meeting in process, he asked if he was supposed to be invited, and Schmidt spoke for the group and told him he was not.

(5) In April 1995, Schmidt spoke out on behalf of the staff against the increasing workload, and McNaughton responded by questioning Schmidt's own personal workload, in front of his colleagues. Schmidt relayed this occurrence in a memo to Editor Steve Benka, dated May 25, 1995, stating "I am sure you recall that when I spoke strongly on behalf of the staff [about the increasing workload at the magazine], McNaughton responded with an angry personal attack, saying that I haven't done more work. . . . this marks the first time a manager has become angry about [my expression of views on the quantity of my work]. See Memo to Editor Steve Benka from Jeff Schmidt, dated May 25, 1995 (Exhibit 7).

(6) In October and November 1996, Schmidt and several other co-workers, including Jean Kumagai, Toni Feder, and Paul Elliott, lobbied management to hire additional staff to help with their increasing workload. After discussions with more co-workers, Schmidt, Kumagai, Feder, and Elliott prepared and presented a ten-point list of changes to be implemented in the workplace. See Proposals for discussion at *Physics Today* retreat, dated November 15, 1996 (Exhibit 8). Among the requests were: (1) better job security; (2) staff involvement in workplace dispute resolution; (3) better distribution of job tasks; and (4) changing hiring practices to increase diversity. See Exhibit 8.

(7) In September 1997, Schmidt and a majority of staff members presented a similar list of requests to management and requested time on the agenda to raise staff concerns at the company retreat. Management responded angrily in the debates between staff and management over the proposed agenda in the days leading up to the September 25 retreat. At a staff meeting before the retreat, Schmidt again asked Editor Charles Harris to include more support staff. Harris responded that he did not want them to attend. At the retreat, when Schmidt raised the issue of whether staff members may ask questions, Harris said no. When Schmidt questioned Harris' position, Harris angrily shouted, "No! That's an order!" Following this episode, Harris commented negatively to Schmidt's co-workers about Schmidt's job performance, and he told Schmidt that he thought Schmidt's request for the right to ask questions was a disguised attempt to raise issues of staff concern.

(8) October 1, 1997, Harris and Benka issued Schmidt a written notice implying that Schmidt may be fired the next time he said anything that management considered "counterproductive." See Memo to Jeff Schmidt from Charles Harris, dated September 26, 1997 (Exhibit 9). This notice also prohibited Schmidt from discussing this issue with his co-workers, stating:

"We welcome constructive and productive contributions from you, but behavior by you that we consider destructive and counterproductive will no longer be tolerated. Your continued interruption at our retreat, after you were instructed to hold your questions and comments until the discussion segment of the agenda, is an example of what we mean. The continuation of such behavior on your part, in the office or at any work-related activity, will not be tolerated. This notice is to be treated as confidential.

Exhibit 9. When Schmidt informed co-workers of this warning, Harris criticized Schmidt for doing so. On October 17, 1997, Schmidt and a group of co-workers, including Jean

Kumagai, Paul Elliot, Graham Collins, and Toni Feder, presented a written grievance to the *Physics Today* Advisory Committee at its annual meeting stating:

What concerns us is the increasingly repressive work environment at the magazine. . . . We regret having to be the undersigned here, but in the last year . . . we have been increasingly subjected by management to verbal abuse, direct threats of dismissal and warnings about speaking out in front of both *Physics Today* managers and others outside of *Physics Today*. . . . Both [Schmidt] and Graham [Collins] have been outspoken about problems that many of us see at the magazine. We feel that the warnings contribute to a repressive atmosphere at the magazine and restrict all of us. We hope the advisory committee will do whatever it can to get these warnings retracted and to remind the PT managers that repression is counterproductive. Such steps would go a long way toward diminishing the fear that the staff members now associate with trying to openly address problems at the magazine.

See Letter to Members of the Physics Today Advisory Committee, dated October 17, 1997 (Exhibit 10). One and one half months later, the warnings against discussing grievances with co-workers were (briefly) rescinded. See E-mail from Charles Harris to *Physics Today*, dated December 1, 1997 (Exhibit 11).

(9) In January 1998, Stephen Benka, Editor of *Physics Today*, interrupted and broke up a private conversation, held outside of working hours, between Schmidt and co-worker Toni Feder. [REDACTED] Later that day, Schmidt was speaking on the telephone with Feder. Benka came into Schmidt's office and asked if he was talking to an author. When Schmidt responded that he was talking to a co-worker, Benka informed him that he wanted in on the conversation. Shocked at this invasion, Schmidt placed Feder on speakerphone and informed her of Benka's presence. Benka said that Feder should come to Schmidt's office. When she arrived, Benka demanded to know what Feder and Schmidt had been speaking about [REDACTED]

[REDACTED] Thus, once again, private workplace dialogue was banned.

(10) In March 1998, Schmidt met with Benka to discuss Schmidt's 1998 performance review. [REDACTED]

v

'c

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(11) On the evaluation form, Benka reduced Schmidt's performance rating from "Exceeds Job Requirements" to "Meets Job Requirements." [REDACTED]

Benka also added a large increase in Schmidt's workload, whereby he would now be expected to edit 18 articles a year, rather than 14, a 28% increase.

(12) Schmidt appealed his performance review to James Stith, Director of *Physics Today*, and Kathy Braun, the Director of Human Resources. In his appeal, Schmidt contended that the "biased review [he] received was punishment for [his] organizing activity at the magazine." See Memo from Jeff Schmidt to Theresa Braun and James Stith, Subject: [Schmidt's] 1998 performance review, dated April 27, 1998 (Exhibit 12).

(13) Several months later, Schmidt met with Stith about his 1998 performance review. In that meeting, Stith made it clear [redacted] that [redacted] workplace activity, apart from [redacted] job assignments, played a central role in [redacted] critical review and lowered job performance rating. [redacted]. In a response to Schmidt's complaints of improper retaliation, Director Stith bluntly warned when you do things your supervisors would be happier that you not do, then you have to be willing to pay the penalty, even if what you do is right. In their meeting, Stith acknowledged that he knew about the "ban on private conversations in the workplace" and would look into it. [redacted]. The ban, however, was never rescinded.

(14) To the contrary, upon returning from a six month unpaid leave of absence (December 1998 to June 1999), Schmidt was immediately criticized by Benka for sharing his appeal with his co-workers and told Schmidt that he was lucky to still have his job after doing that. [redacted]

(15) In August 1999, Schmidt received his job performance review for the period from February 1998 to August 1999. This review stated, "[d]uring this review period, Jeff repeatedly engaged in disruptive and counterproductive behavior, damaging a collegial office climate, thereby undermining the editorial effort of *Physics Today*. Such behavior is unacceptable." [redacted]. When Schmidt met with Benka to

discuss the review, Benka expressed anger about Schmidt's communications with co-workers about workplace issues. [REDACTED] Benka then admonished Schmidt for talking to co-workers about the 1999 performance review and demanded that Schmidt tell him which co-workers he had spoken with about issues raised in the 1999 review, which Benka again requested in an e-mail to Schmidt. [REDACTED]

(16) Later that month, Schmidt met with several other co-workers to discuss how to protect our right to communicate privately about workplace issues such as performance reviews and punitive treatment by management. [REDACTED]

[REDACTED] In that meeting, Schmidt informed the co-workers that Benka wanted the names of the staff members with whom Schmidt had shared the results of his 1999 performance review. [REDACTED] When Schmidt refused to give Benka the names of those co-workers, Benka reiterated his opposition to private conversations between staff members about workplace issues and responded, everything to do with the job is his domain and there should be no privacy from him. [REDACTED]

In sum, by late 1999, management had made it eminently clear that it wanted Schmidt's concerted activity to stop. It also had repeatedly threatened him with dismissal if its warnings were not heeded.

Schmidt's Firing

In April 2000, Schmidt published his first book, Disciplined Minds: A Critical Look at Salaried Professionals and the Soul-Battering System That Shapes Their Lives. In the Introduction of the book, Schmidt writes:

This book is stolen. Written in part on stolen time, that is. I felt I had no choice but to do it that way. Like millions of others who work for a living, I was giving most of my prime time to my employer. My job simply didn't leave me enough energy for a major project of my

own, and no one was about to hire me to pursue my own vision, especially given my irreverent attitude toward employers. I was working in New York City as an editor at a glossy science magazine. . . . So I began spending some office time on my own work, dumped my TV to re-appropriate some of my time at home, and wrote this book.

Exhibit 13.

On May 31, 2000, Stephen Benka, Editor of *Physics Today*, Theresa Braun, the Institute's Director of Human Resources, and Randolph Nanna, the Publisher of *Physics Today*, called Schmidt to the personnel department, where Benka told Schmidt:

We see in your own introduction to your own book that you have stolen from the magazine. Therefore, you can no longer be employed by *Physics Today*. Your employment is terminated, now.

[REDACTED] No other reason was ever given to Schmidt or, to his knowledge, to anyone else for his dismissal.⁴ Schmidt was then told that he would not be allowed to reenter the building at any time or for any reason, and he was escorted to the front door. [REDACTED] Benka then called a meeting of Schmidt's co-workers, and informed them that Schmidt had been fired for cause. Later in the day, Benka went from office to office, cryptically explaining to Schmidt's co-workers that Schmidt had been fired for doing something other than what Schmidt had been paid to do. [REDACTED] Neither Benka, nor Nanna, nor Braun, however, asked Schmidt what he meant by "office time" or whether he had actually worked on the book during working time. In fact, Schmidt's reference to "stolen time" was hyperbole, a

⁴ In a proceeding before the State of Maryland Department of Labor to determine Schmidt's eligibility to receive unemployment benefits, the Institute contended that Schmidt "was discharged from the [Institute] on 6/2/00 because it was alleged that the claimant wrote a book on company time." ⁴ See Exhibit 14.

literary reference to Abbie Hoffman's 1971 classic, Steal This Book. [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
Although Schmidt did not work on his book during company time during his tenure at the magazine, many of his co-workers openly pursued work that was not related to the magazine while on company time. [REDACTED]

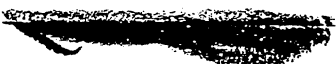
[REDACTED] None were fired, disciplined or even admonished to stop. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Typical of other employees at the magazine, [REDACTED] openly worked on a number of freelance pieces, making long-distance calls, using the company's computer and the magazine's library for research, and discussing the articles with his co-workers. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

Physics Today's tolerance of outside work on company time reflects the norm in the industry. [REDACTED]

[REDACTED]

 In fact, several employees of *Physics Today* published articles while they were employed there. See Exhibit 17. In 1994, *Physics Today*'s Managing Editor Kenneth J. McNaughton pursued a 200-page editing project as a guest editor, while Managing Editor. See *Creativity Research Journal*, Vol. 7, Nos. 3 and 4, 1994 (Exhibit 17).

ARGUMENT

On these facts, there is little doubt that Schmidt's firing violated the Act. Schmidt openly and consistently engaged in protected concerted activity, such activity was known to the management of *Physics Today*, and management repeatedly criticized, disciplined, and targeted Schmidt because of his participation in protected activity. This demonstrated animus, combined with the transparently pretextual nature of management's stated reason for firing Schmidt, leave little doubt that management's motive was unlawful. Certainly, Schmidt deserves his day in court to make that case.

A. Legal Standard

Section 8(a)(1) of the National Labor Relations Act provides:

It shall be an unfair labor practice for an employer – (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7.

29 U.S.C. § 158(a)(1). Section 7 protects the rights of employees “to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. Although “concerted activity” is not expressly defined in the Act, the term “clearly enough embraces the activities of employees who have joined together to achieve common goals.” New River Industries, Inc. v. NLRB, 945 F.2d 1290, 1294 (4th Cir. 1991). Letters, or other writings, intended to resolve or call attention to conditions of employment are considered protected, concerted activity. See id. at 1295. The activity, must, however, be engaged with or on the authority of other employees, and not solely by and on behalf of the employee himself. Meyers Industries, Inc., 268 NLRB 493 (1984).

“Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee’s activity, the concerted activity was protected by the Act, and the adverse employment action at issue was motivated by the employee’s protected concerted activity.” Meyers Industries, Inc. 268 N.L.R.B. 493, 17 (1984); Wright Line, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981). Section 8(a)(3) protects against firings [of employees] due to anti-union animus. See Dorsey Trailers, Inc. v. NLRB, 233 F.3d 831, 839 (4th Cir. 2000) (citing NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981)). In order to establish an employer’s discriminatory discharge, the “General Counsel must prove by a preponderance of the evidence that anti-union animus was a substantial or motivating factor in the discharge.” *Id.* The burden then shifts to the employer to prove that it would have fired the employee

even in the absence of anti-union animus. *Id.* If the Board finds that the Institute's stated reason for firing Schmidt is false, the Board may draw the inference that the Institute discharged Schmidt for unlawful reasons. Active Transportation, 296 NLRB 431, 432 n.8 (1989).

B. Schmidt's history of concerted, protected activity was well known by the Institute and the Management of *Physics Today*

There is no doubt that Schmidt engaged in concerted activity protected by the Act. He and his co-workers shared a rich history of collective activity aimed at improving conditions for support staff, writers, and other editors. For many years, Schmidt and his co-workers repeatedly addressed issues concerning: (1) requests for relief from an increasing workload; (2) staff involvement in dispute resolution, decision-making, the hiring process, and staff's attendance at the Institute's annual conference; (3) relief from disrespectful and abusive managers; and (4) relief from management's restrictions on staff's private communications on both working and non-working time. *See Exhibits 4, 5, 9, and 10.* This activity clearly was intended to call management's attention to perceived deficiencies in working conditions.

It also clearly was "concerted." Typically, Schmidt and his co-workers would hold a meeting to discuss workplace problems and potential solutions. Thereafter, one or more co-workers, usually including Schmidt, would draft a memoranda on behalf of the staff, and present their concerns to management. Sometimes, Schmidt and his co-workers would raise their concerns verbally at staff meetings. In short, Schmidt acted not as a lone wolf looking out for his own interests; rather, he acted as a spokesperson for his fellow workers. Accordingly, his activity was protected by the Act. *See New River Industries*, 945 F.2d at 1295; Meyer Industries, Inc. 268 NLRB at 497.

C. Management repeatedly criticized, disciplined, and ultimately discharged Schmidt in retaliation for Schmidt's participation in these activities.

Schmidt's concerted, protected activity invariably was met with reprisals from management. Schmidt's protected activity was criticized publicly, he was downgraded on his evaluation expressly because of his protected activity, he was ordered to stop having private communications with co-workers about workplace issues, and he was admonished that if such activity continued, he would have to "pay the penalty." Ultimately, when management thought that it had a lawful excuse, it carried out its threats and fired Schmidt.

A few examples suffice. At the 1997 retreat, Schmidt attempted to raise work place concerns. Harris responded with an outburst, screamed at Schmidt, and ordered him to stop raising staff issues during the retreat's question and answer period. This was not a mere isolated loss of temper. It was followed by a written warning to Schmidt (following the retreat) that he should refrain from such "counterproductive" behavior and that he should not discuss this warning with his co-workers.

Management's criticism of Schmidt's concerted activity was the main focus of Schmidt's 1998 and 1999 performance evaluations. Despite the fact that the stated purpose of such evaluations was to "give the employee an opportunity to sit down with [his or her] supervisor to review how [the employee's] work has progressed since the last review" (see AIP Employee Handbook, 1999, p. 18 [emphasis added] (Exhibit 18)), Schmidt's 1998/99 evaluations barely addressed the quality of his work product; they focussed on his tenacity in raising workplace concerns that management did not want to hear.

When Schmidt appealed his 1998 evaluation to the Institute's Director of Physics Programs, James Stith, Director Schmidt bluntly admitted that Schmidt's workplace activity, apart from his job assignments, played a central role in Schmidt's critical review and lowered job performance rating. [REDACTED] Stith also added, prophetically, that, "When you do things your supervisors would be happier that you not do, then you have to be willing to pay the penalty, even if what you do is right. (read "protected").

By August 1999, management had clearly lost patience with Schmidt's refusal to stop speaking out. They had reinstated their prohibition, originally instituted in January 1998, against all private workplace conversations between staff members. This ban, clearly aimed mainly at Schmidt, amounted to an announcement that all communications among employees would be monitored; in Editor Benka's words, everything to do with the job is management's domain, and there should be no privacy from management [REDACTED]
[REDACTED]

When this measure proved incapable of silencing Schmidt, management welcomed even a weak pretext for dismissing him. It seized on a single literary passage in Schmidt's book to fire him, supposedly for writing on "stolen" time. Unfortunately for the Institute, Schmidt did not "steal" any time. He merely did what many colleagues had done for many years; he used non-working down time and facilities to do freelance writing, a practice condoned by *Physics Today* and virtually every other periodical in the industry.

- D. The Institute's stated reason for firing Schmidt is false. The Institute would not have fired Schmidt in the absence of his protected, concerted activity as evidenced by the Institute's practice of allowing and even facilitating the industry's custom of allowing its employees to pursue their own personal writing on company time.
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If the Board finds that the Institute's stated reason for firing Schmidt is false, the Board may draw the inference that the Institute discharged Schmidt for unlawful reasons. Active Transportation, 296 NLRB 431, 432 n.8 (1989). The Institute has stated, on at least two separate occasions, that it terminated Schmidt because he worked on his book during company time. At Schmidt's dismissal, Editor Steve Benka told Schmidt:

We see in your own introduction to your own book that you have stolen from the magazine. Therefore, you can no longer be employed by *Physics Today*. Your employment is terminated, now.

[REDACTED] No other reason was ever given. Also, in the proceedings before the State of Maryland Department of Labor, the Institute contended that Schmidt "was discharged from the [Institute] on 6/2/00 because it was alleged that the claimant wrote a book on company time." ⁷ See Exhibit 14.

That this was the Institute's true reason for firing Schmidt, is belied by the Institute's long history of condoning, or even encouraging, outside writing, and it is inherently incredible, given the longstanding industry practice. For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁷ Interestingly, the Department found that "insufficient information has been presented to show that the claimant's actions constituted misconduct in connection with the work." Exhibit 18.

[REDACTED] The fact that the Editor had no problem with a writer pursuing freelance work while at *Physics Today*, demonstrates that at the very least, the magazine was aware of and did not prohibit its employees from pursuing outside projects.

Moreover, the Institute provided free long distance and computer services to its employees. When [REDACTED] was hired, [REDACTED] confirmed with the Human Resources Department, [REDACTED] that [REDACTED] would have unlimited long-distance telephone privileges as a benefit of working at the Institute. [REDACTED] This privilege allowed [REDACTED] to conduct long distance telephone interviews, free of charge, while at work.

[REDACTED] and other employees at *Physics Today* did personal work during company time. [REDACTED] openly worked on a number of freelance pieces, made long-distance calls, used the company's computer and the magazine's library for research, and discussed the articles with his co-workers. [REDACTED] Another [REDACTED] also spent a considerable amount of time pursuing freelance projects while working for the magazine. [REDACTED]

[REDACTED] No one, other than Schmidt, was ever punished for such activity.

Physics Today's tolerance of outside work on company time reflects the norm in the industry. One does not have to dig deep to know that many writers and editors employed by newspapers and magazines do freelance writing. Bob Woodward and Carl Bernstein were writers for the *Washington Post* when they published All the President's Men. The staff writers of *The New Yorker* are famously prolific. The list could go on and

on - - virtually every well-known journalist, including William Manchester, Jack Germond, and William Buckley, has written outside works. No one would believe that none of this writing was done on time "stolen" from the employers.

[REDACTED]

[REDACTED]. To expect anything less of one who enters the field of journalism is unrealistic.⁸

At bottom, for the Institute to suggest that it fired Schmidt for working on a book during company time, is at best a fast and loose interpretation of its own practices and the industry's unwritten rules and customs. At worst, it is a calculated misrepresentation, contradicted by voluminous evidence.

On the other hand, substantial evidence (and logic) supports the view that the Institute's true motive for discharging Schmidt was its escalating hostility to his protected activity. For nineteen years, Schmidt tirelessly advocated improvement in the working conditions of the staff, writers, and editors at *Physics Today*. For the last ten years, and

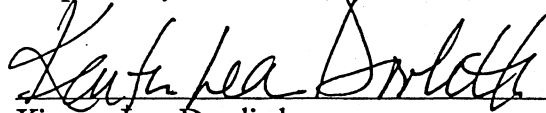
⁸ As additional proof of the frequency of this custom, charging party has attached several articles written by other *Physics Today* staff members which were published while employed at *Physics Today*, including a 200-page article edited by *Physics Today*'s own Managing Editor, Kenneth McNaughton. See Exhibit 17. It is simply not realistic to suggest that 1) all of these articles were entirely researched, written and edited, while not on company time, and 2) that the Institute was not aware of and did not encourage this practice. We will, if the Office desires, supplement additional declarations from Schmidt's former co-workers as to their experiences pursuing freelance projects while working for *Physics Today*.

especially during the last three years, management's responses to Schmidt's organizing efforts had grown increasingly strident. Finally, they carried out the ultimate threat.

CONCLUSION

For the foregoing reasons, the Office of Appeals should reverse Region 5 and issue a complaint alleging that the Institute unlawfully discharged Schmidt in violation of Sections 8(a)(1) and (5) of the Act.

Respectfully submitted,



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UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
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DATE: May 8, 2001

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Dear Ms. Doolittle:

This is in response to your letter dated April 24, 2001, received in this Office on April 25, 2001, in which you request, pursuant to the Freedom of Information Act (FOIA), "a copy of the version of Charging Party Jeff Schmidt's appeal that was submitted to the American Institute of Physics ... [re: 5-CA-29366]."

I have enclosed the requested document.

Sincerely,


John W. Hornbeck
Freedom of Information Officer
Telephone: (202) 273-3840

Enclosure

BMR:kmb
doolittle.bmr

bc: Chron